

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROMAN DULA

Claimant

VS.

**ADVANCED DRILLING
TECHNOLOGIES LLC**

Respondent

AND

ARGONAUT INSURANCE COMPANY

Insurance Carrier

Docket No. 1,034,957

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 14, 2010, Award entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on March 23, 2011. Kathleen J. Cossairt, of Lenexa, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that the medical evidence indicated claimant's facial neuralgic pain fell into the mild impairment category rather than the moderately severe category and, accordingly, held that claimant had a 7 percent functional impairment. This impairment was in addition to a stipulated 17.5 percent impairment to claimant's left upper extremity and 4 percent impairment for claimant's emotional distress. These three impairments combine for a 20.5 percent permanent partial impairment to the body as a whole.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that the record does not include the transcript of the November 17, 2008, evidentiary deposition of claimant but does include Exhibit B. However, Exhibit A should not have been part of the record as counsel for respondent did not sign the proposed Stipulation for its admission into evidence and objects to its

admission. During oral argument to the Board, respondent clarified that respondent was only objecting to the summarized description of Exhibit A, not to the actual medical records themselves. Accordingly, the medical records in Exhibit B are admitted but without the summary of those records prepared by claimant's counsel.

ISSUES

Claimant requests review of the ALJ's finding that he had a 7 percent permanent partial impairment due to his facial neurologic pain. Claimant argues that Dr. Michael Ryan's rating opinion should be disregarded or its weight discounted because it was not based on the 4th edition of the *AMA Guides*.¹ And he also argues that Dr. Jay Zwibelman's rating opinion should also be disregarded because he did not reference which section of the *AMA Guides* he used to support his opinion and he rated only claimant's pain, not his facial injuries. Claimant also argues that the ALJ erred in finding that rating opinions should not be averaged, noting that the Board has previously found that rating opinions can be averaged in determining a claimant's percentage of functional impairment.

Respondent asks that the Board affirm the findings of the ALJ, including that the claimant suffered a 20.5 percent impairment to the whole body as a result of his work-related accident. Respondent argues that the court considered all the evidence before it, including the testimony of claimant and the rating opinions of the physicians. Respondent also argues that averaging the ratings of the physicians is not good public or administrative policy as it gives claimants incentive to get higher ratings and respondents incentive to get lower ratings. Respondent contends this makes claims more difficult to resolve and encourages litigation and, further, is not supported by the Workers Compensation Act.

The issue for the Board's review is the nature and extent of claimant's work-related disability. Specifically, what is the percentage of permanent impairment attributable to his facial injuries?

FINDINGS OF FACT

Claimant was injured on November 29, 2006, when he was hit on the left side of his face by a piece of metal in the shape of a boomerang. The accident caused claimant massive facial injuries, including crushing many of the bones in his face, on both the left and right sides. He also injured his left shoulder and had a couple of broken ribs. Claimant was flown to a hospital in Denver, Colorado, where he underwent four surgeries, three on his face and one on his left shoulder.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Respondent has accepted compensability of this claim, and the parties have stipulated that claimant suffered a 17.5 percent permanent partial impairment to his left upper extremity at the level of the shoulder and a 4 percent permanent partial impairment to his whole body for his emotional distress. Claimant has returned to work, and there is no claim for a work disability. The ALJ was left to determine the impairment for claimant's facial injuries.

Claimant testified that his facial surgeries were performed from the inside, so he has few scars as a result. He claims that he continues to suffer from facial pain, especially around the area of his teeth. He also suffers from headaches. He is seeing Dr. Nancy Kaplitz, a neurologist, and is taking medication for his facial pain and headaches.

Dr. Michael Ryan, a board certified neurologist, evaluated claimant on December 2, 2008. Claimant told Dr. Ryan that as a result of his accident, he continued to have headaches, facial pain and visual disturbances. The facial pain is particularly in his chin and teeth area. Claimant said his shoulder was also injured, but he was doing well in that regard.

Dr. Ryan, after examining claimant, diagnosed him with post closed head injury, orbital fracture with post-traumatic headaches; concussion with post-concussion-type symptoms, residual atypical facial pain; and horizontal diplopia secondary to orbital fracture. Dr. Ryan believed most of claimant's symptoms are improving. He recommended that claimant try using amitriptyline for his headaches.

Dr. Ryan opined that claimant made a remarkable recovery. However, based upon claimant's complaints of postconcussion headaches and atypical facial pain, which Dr. Ryan said were likely permanent, he rated claimant as having a 7 percent permanent partial impairment to the whole person. Although Dr. Ryan used the 5th edition of the *AMA Guides* when rating claimant, he testified that impairment would not change if he had used the 4th edition of the *AMA Guides*. Dr. Ryan did not place any restrictions on claimant.

Claimant was seen by Dr. Jay Zwibelman, a neurologist, on April 28, 2009, at the request of the ALJ. Dr. Zwibelman took a history and reviewed claimant's medical records from the accident. Claimant complained to Dr. Zwibelman of occasional facial pain and daily teeth pain. Claimant said he is unable to eat hard food, such as apples. He complained of daily headaches located frontally that radiate to the back. At times, symptoms could be provoked by excessive talking or laughing. He can no longer run because of the pain.

Dr. Zwibelman found claimant had a negative neurologic examination and opined that claimant had no objective partial permanent disability. But claimant still experiences pain. He continues to slowly improve but has reached a plateau. He requires pain medication on an ongoing basis, as well as medication for depression and anxiety. The

pain impairs some of his daily activities. Based on the *AMA Guides*, Dr. Zwibelman found that claimant had a permanent partial impairment of 5 percent to the body as a whole.

Claimant was examined on December 23, 2009, by Dr. Bernard Abrams, a neurologist, at the request of claimant's attorney. Claimant complained of pain in his upper teeth, a burning sensation behind his eyes, double vision, and headaches. Claimant described the pain in his teeth as between a 2 and a 9 on a 10 point scale. Claimant's problems did not affect his speech, his ability to chew or his ability to swallow. Claimant said he had pain in his upper teeth all the time and the lower teeth on a bad day.

Dr. Abrams opined that claimant had a 20 percent impairment for uncontrolled facial neurologic pain based upon claimant's reports of pain and upon the inciting event. Dr. Abrams said the inciting event was a highly significant facial injury of the type that could be expected to produce the type of pain of which claimant is complaining. He used the *AMA Guides*, Table 9, Page 145, which lists the trigeminal nerve, and which is the distribution point of claimant's pain. Dr. Abrams said trigeminal nerve pain is graded according to whether it is mild, moderately severe, or severe. It was Dr. Abrams' opinion that claimant had moderately severe pain because it was pervasive and constant, it impaired his ability to do certain things, and it was disturbing and depressing to claimant. Dr. Abrams said the impairment range for moderately severe pain was 14 to 25 percent and he chose the middle of that range, 20 percent, as claimant's permanent impairment.

Dr. Abrams also rated claimant with an additional 5 percent impairment for headaches. He admitted that headaches are difficult to rate because the *AMA Guides* do not specifically speak to the issue of pain. But he said he believed a 5 percent was a modest rating for something that was understandable in view of the injury claimant suffered. Using the Combined Values Chart of the *AMA Guides*, the 20 percent and the 5 percent body as a whole ratings combine to a 24 percent rating.

Dr. Abrams recommended a switch of medications for claimant. He did not place any restrictions on claimant.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. . . . If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

In *Pierce*,² the Kansas Court of Appeals stated:

We recognize that an impairment rating must comply with the AMA Guides to be considered in determining the claimant's disability. But the Guides are just that—a guide to be used by the physician to arrive at an impairment of function. Two physicians can rate the same injuries using the AMA Guides and arrive at different impairment ratings. It is up to the physician using the AMA Guides to exercise some discretion to arrive at what the physician believes is an accurate impairment for the injuries sustained by the patient.

ANALYSIS

Dr. Abrams found claimant has “moderately severe, uncontrolled facial neuralgic pain.”³ Dr. Abrams then used Table 9 on page 145 of the *AMA Guides* to find claimant's functional impairment is 20 percent per that portion of the *Guides*, plus an additional 5 percent for the headaches. The ALJ applied Table 9 of the *AMA Guides* to find claimant has a 7 percent impairment of function from his facial injuries. The ALJ said he was basing his determination on the opinions of Drs. Zwibelman and Ryan, who purportedly both placed claimant in the mild impairment range of Table 9.

² *Pierce v. L7 Corporation/Wilcox Painting*, No. 103,143, unpublished Kansas Court of Appeals opinion, slip op. at 7, 2010 WL 3732083 (filed September 17, 2010); see also *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

³ *Abrams Depo.*, Ex. 2 at 2.

Drs. Ryan and Zwibelman both found claimant's impairment criteria to fall in the mild impairment range as set forth in the AMA Guides to the Evaluation of Permanent Impairment 4th Edition, which means claimant suffers a whole person impairment of 0-14%.

. . . .
. . . Dr. Zwibelman found that claimant suffers a 5% impairment to the body as a whole based upon a mild impairment as set forth in Table 9 of the AMA Guides 4th Edition. . . . The legislature specifically set forth the criteria from which functional impairment shall be determined, and that is based upon the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment. Since the preponderance of medical evidence would indicate that claimant has a mild impairment as set forth in Table 9 of those guides, the appropriate impairment rating should be in the range of 0-14%. The administrative law judge finds that claimant has sustained a 7% functional impairment, this being mid way between the mild impairment range provided in the table. . . .⁴

Contrary to the ALJ's findings, however, neither Dr. Ryan nor Dr. Zwibelman referred to Table 9 as the bases for their respective rating opinions. As such, the ALJ went outside the record to find that claimant fit within the 0 to 14 percent impairment category under Table 9 of the *AMA Guides*. This conclusion is unsupported by the expert medical opinion testimony. Dr. Ryan did opine that claimant's permanent impairment of function for the headaches, facial pain and visual disturbances was 7 percent. However, Dr. Ryan did not relate that 7 percent impairment rating to a particular table in the *AMA Guides*. Similarly, Dr. Zwibelman gave a rating opinion of 5 percent but did not say how that rating was arrived at beyond saying it was based on the *AMA Guides*.

The Board finds that Dr. Abrams' description of claimant's facial pain as moderately severe is more consistent with claimant's testimony and description of his injuries and ongoing symptoms. Claimant must take medication on a daily basis to control his facial pain and headaches. As such, the Board accepts the 24 percent rating opinion of Dr. Abrams over the ratings offered by Drs. Ryan and Zwibelman. Combining the 24 percent rating for the facial pain and headaches with the agreed-upon 17.5 percent impairment to the shoulder, which when converted to a whole body is 11 percent, and 4 percent whole body impairment for emotional distress yields a total impairment of 35 percent.

CONCLUSION

Claimant's total permanent partial impairment of function is 35 percent.

⁴ ALJ Award (December 14, 2010) at 6.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated December 14, 2010, is modified to find that claimant has a 35 percent permanent partial impairment to the whole body.

Claimant is entitled to 92 weeks of temporary total disability compensation at the rate of \$483 per week or \$44,436, followed by permanent partial disability compensation at the rate of \$483 per week not to exceed \$100,000⁵ for a 35 percent functional disability, which is all due and owing and is ordered paid in one lump sum, less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kathleen J. Cossairt, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

⁵ See *Roberts v. Midwest Mineral, Inc.*, 41 Kan. App. 2d 608, 204 P.3d 1177 (2009), *rev. denied* 290 Kan. ____ (2010).